# Suruhanjaya Persaingan v Tribunal Rayuan Persaingan & Ors

HIGH COURT (KUALA LUMPUR) — JUDICIAL REVIEW APPLICATION NO WA-25–591–12 OF 2022
AHMAD KAMAL J
15 APRIL 2024

*Administrative Law — Judicial review — Application for leave — Applicant applied for leave to commence judicial review against decision of first respondent in setting aside applicant's decision — Whether applicant had locus standi to challenge decision issued by first respondent — Whether applicant aware that Court of Appeal's decision in Malaysian Airline System Bhd v Competition Commission and another appeal [2021] MLJU 2089 was settled law — Whether there was full and frank disclosure by applicant*

The applicant ie the Malaysian Competition Commission ('MyCC') was established with the purpose of enforcing the Competition Act 2010 ('the Act') and safeguarding the process of free and fair competition in commercial markets for the benefit of consumer welfare. The first respondent ie the Competition Appeal Tribunal ('CAT') was an independent judicial body established under s 44 of the Act and had the exclusive jurisdiction to review any decision made by the MyCC under ss 35, 39 and 40 of the Act. The second respondent ie the General Insurance Association of Malaysia ('PIAM') was the national trade association of all licensed direct and reinsurance companies for general insurance. The third to 24th respondents were all members of PIAM. On 14 September 2020, the MyCC had issued a decision ('the final decision') where it found that the second to 24th respondents had infringed s 4(1) read with s 4(2)(a) and (3) of the Act by participating in an agreement which had, as its object, the prevention, restriction, or distortion of competition in relation to the market for parts trade and labour rates for PIAM approved repairer scheme ('PARS') workshops. In the final decision, the MyCC imposed the following directions against the second to 24th respondents, inter alia: (a) to cease and desist from implementing the agreed parts trade discount for six vehicles makes and the hourly labour rate for PARS workshops with immediate effect; and (b) to pay a financial penalty. Dissatisfied with the final decision, the second to 24th respondents filed appeals against the final decision to the CAT pursuant to s 51 of the Act ('the insurer appeals') and also filed applications to stay the final decision pending the disposal of the substantive appeal pursuant to s 53 of the Act. The CAT panel allowed the stay applications and the insurer appeals; and set aside the MyCC's final decision. Hence, the present judicial review application by the MyCC. The application for leave to commence judicial review was jointly objected to by the second to 24th respondents on the ground

that the MyCC did not have the locus standi to challenge the decision issued by the CAT.

**Held**, dismissing the application:

(1) The MyCC lacked the locus standi required to commence judicial review proceedings to challenge the CAT's decision as they were not a person adversely affected by the decision of the CAT within the meaning of O 53 r 2(4) of the Rules of Court 2012 as expressly ruled by the Court of Appeal in *Malaysian Airline System Bhd v Competition Commission and another appeal* [2021] MLJU 2089 ('AirAsia/MAS'). Therefore, the MyCC judicial review leave application was a non-starter and the MyCC had failed to meet the threshold for judicial review leave to be granted (see paras 31, 35 & 39).

(2) As this issue had been addressed *AirAsia/MAS*, it had become settled law, which the MyCC was aware of because the MyCC was a party to the appeal in which the *AirAsia/MAS* was made. Further, the MyCC had always been aware because the MyCC issued a consultation paper on the proposed amendments to the act ('the consultation paper') and the salient points of the proposed amendments to the act ('the salient points') where the MyCC had proposed the insertion of s 58A to the Act to provide the MyCC with a right to appeal to the High Court against decisions made by the CAT. Therefore, the MyCC's action of filing the judicial review leave application was ultra vires, unlawful and untenable (see paras 40 & 44).

(3) The MyCC had failed to exhibit all the relevant documents to ensure that the court had a complete picture of the case by failing to disclose the consultation paper and the salient points where the MyCC had proposed for the insertion of s 58A to the Act to provide the MyCC with a right to appeal to the High Court against decisions made by the CAT. The MyCC had failed to adhere to its duty of full and frank disclosure in the judicial review leave application because the MyCC had failed to appraise the court of the crucial consultation paper and the salient points which showed that the MyCC was seeking to amend the Act to confer itself a right of review or appeal against a decision of the CAT in light of the *AirAsia/MAS* decision — as no such right currently existed (see paras 53 & 55).

**[Bahasa Malaysia summary**

Pemohon iaitu Suruhanjaya Persaingan Malaysia ('MyCC') ditubuhkan dengan tujuan untuk menguatkuasakan Akta Persaingan 2010 ('Akta') dan melindungi proses persaingan bebas dan adil dalam pasaran komersial demi manfaat kebajikan pengguna. Responden pertama iaitu Tribunal Rayuan Persaingan ('CAT') merupakan badan kehakiman bebas yang ditubuhkan di

bawah s 44 Akta dan mempunyai bidang kuasa eksklusif untuk menyemak sebarang keputusan yang dibuat oleh MyCC di bawah s 35, 39 dan 40 Akta. Responden kedua iaitu Persatuan Insurans Am Malaysia ('PIAM') adalah persatuan perdagangan nasional bagi semua syarikat insurans langsung dan insurans semula berlesen untuk insurans am. Responden ketiga hingga ke-24 merupakan ahli PIAM. Pada 14 September 2020, MyCC telah mengeluarkan satu keputusan ('keputusan akhir') di mana ia mendapati bahawa responden kedua hingga ke-24 telah melanggar s 4(1) dibaca bersama s 4(2)(a) dan (3) Akta dengan menyertai perjanjian yang mempunyai objek untuk menghalang, menghadkan, atau memesongkan persaingan berhubung pasaran untuk perdagangan alat ganti dan kadar buruh untuk bengkel skim pembaiki yang diluluskan PIAM ('PARS'). Dalam keputusan akhir tersebut, MyCC mengenakan arahan berikut terhadap responden kedua hingga ke-24, antara lain: (a) untuk menghentikan pelaksanaan diskaun perdagangan alat ganti yang dipersetujui untuk enam jenama kenderaan dan kadar buruh setiap jam untuk bengkel PARS dengan serta-merta; dan (b) untuk membayar penalti kewangan. Tidak berpuas hati dengan keputusan akhir tersebut, responden kedua hingga ke-24 memfailkan rayuan terhadap keputusan akhir kepada CAT menurut s 51 Akta ('rayuan penanggung insurans') dan juga memfailkan permohonan untuk menangguhkan keputusan akhir sementara menunggu penyelesaian rayuan substantif menurut s 53 Akta. Panel CAT membenarkan permohonan penangguhan dan rayuan penanggung insurans; dan mengetepikan keputusan akhir MyCC. Oleh itu, permohonan semakan kehakiman ini oleh MyCC. Permohonan untuk kebenaran memulakan semakan kehakiman dibantah secara bersama oleh responden kedua hingga ke-24 atas alasan bahawa MyCC tidak mempunyai locus standi untuk mencabar keputusan yang dikeluarkan oleh CAT.

**Diputuskan**, menolak permohonan:

(1) MyCC tidak mempunyai locus standi yang diperlukan untuk memulakan prosiding semakan kehakiman untuk mencabar keputusan CAT kerana mereka bukanlah pihak yang terjejas oleh keputusan CAT mengikut maksud A 53 k 2(4) Kaedah-Kaedah Mahkamah 2012 seperti yang telah diputuskan secara jelas oleh Mahkamah Rayuan dalam kes *Malaysian Airline System Bhd v Competition Commission and another appeal* [2021] MLJU 2089 ('AirAsia/MAS'). Oleh itu, permohonan kebenaran semakan kehakiman oleh MyCC tidak boleh diteruskan dan MyCC gagal memenuhi tahap yang diperlukan untuk kebenaran semakan kehakiman diberikan (lihat perenggan 31, 35 & 39).

(2) Memandangkan isu ini telah dibincangkan dalam kes *AirAsia/MAS*, ia telah menjadi undang-undang yang telah ditetapkan, yang diketahui oleh MyCC kerana MyCC adalah pihak dalam rayuan di mana keputusan *AirAsia/MAS* dibuat. Tambahan pula, MyCC sentiasa sedar kerana MyCC mengeluarkan kertas perundingan mengenai cadangan

pindaan kepada akta ('kertas perundingan') dan perkara-perkara utama cadangan pindaan kepada akta ('perkara utama') di mana MyCC mencadangkan penambahan s 58A kepada Akta untuk memberikan MyCC hak untuk merayu ke Mahkamah Tinggi terhadap keputusan yang dibuat oleh CAT. Oleh itu, tindakan MyCC memfailkan permohonan kebenaran semakan kehakiman adalah ultra vires, menyalahi undang-undang dan tidak boleh dipertahankan (lihat perenggan 40 & 44).

(3) MyCC gagal mempamerkan semua dokumen yang relevan untuk memastikan bahawa mahkamah mempunyai gambaran lengkap mengenai kes ini dengan tidak mendedahkan kertas perundingan dan perkara utama di mana MyCC mencadangkan penambahan s 58A kepada Akta untuk memberikan MyCC hak untuk merayu ke Mahkamah Tinggi terhadap keputusan yang dibuat oleh CAT. MyCC gagal mematuhi kewajipannya untuk pendedahan penuh dan jujur dalam permohonan kebenaran semakan kehakiman kerana MyCC gagal memaklumkan kepada mahkamah mengenai kertas perundingan dan perkara utama yang menunjukkan bahawa MyCC sedang berusaha untuk meminda Akta bagi memberikan dirinya hak semakan atau rayuan terhadap keputusan CAT berdasarkan keputusan *AirAsia/MAS* — kerana tiada hak sebegitu wujud pada masa ini (lihat perenggan 53 & 55).]

**Cases referred to**

*Advance Synergy Capital Sdn Bhd (formerly known as Advance Synergy Capital Bhd) v The Minister of Finance, Malaysia & Anor* [2011] 6 MLJ 376; [2011] 7 CLJ 557; [2011] 1 MLRA 477, CA (refd)

*Association of Bank Officers, Peninsular Malaysia v Malayan Commercial Banks Association* [1990] 3 MLJ 228; [1990] 1 MLRA 324; [1990] 1 CLJ Rep 33; [1990] 1 MELR 128; [1990] 2 ILR 308, SC (refd)

*Bandar Utama Development Sdn Bhd & Anor v Lembaga Lebuhraya Malaysia & Anor* [1998] 1 MLJ 224; [1997] 3 MLRH 293; [1997] 4 CLJ 725, HC (refd)

*Dr Amir Hussein bin Baharuddin v Universiti Sains Malaysia* [1989] 3 MLJ 298; [1989] 4 MLRH 408, HC (refd)

*Kerajaan Malaysia & Ors v Tay Chai Huat* [2012] 3 MLJ 149; [2012] 3 CLJ 577; [2012] 1 MLRA 661 [2012] 1 MELR 501, FC (folld)

*Malaysian Trade Union Congress & Ors v Menteri Tenaga, Air dan Komunikasi & Anor* [2014] 3 MLJ 145; [2014] 2 CLJ 525; [2014] 2 MLRA 1; [2014] 2 AMR 101, FC (refd)

*Mior Rosli bin Mior Mohd Jaafar v Mahkamah Perusahaan Malaysia* [2010] MLJU 1674; [2010] 12 MLRH 352; [2010] 1 LNS 1539, HC (refd)

*Malaysian Airline System Bhd v Competition Commission and another appeal* [2021] MLJU 2089; [2022] 1 MLRA 570; [2022] 1 CLJ 856, CA (folld)

*My Teksi Sdn Bhd & Ors v Competition Commission* [2022] 6 MLJ 767; [2023] 3 MLRA 697; (2022) 8 AMR 341

*Suruhanjaya Perkhidmatan Awam Malaysia v Noordin bin Hassan* [1995] 3 MLJ 495; [1996] 1 AMR 030; [1995] 2 MLRA 185, CA (refd)

*Tang Kwor Ham & Ors v Pengurus Danaharta Nasional Bhd & Ors* [2006] 5 MLJ 159; [2006] 1 MLRH 507; [2006] 3 CLJ 448, HC (refd)

*Tuan Hj Sarip Hamid & Anor v Patco Malaysia Bhd* [1995] 2 MLJ 442; [1995] 1 MLRA 536; [1995] 3 CLJ 627, SC (folld)

*WRP Asia Pacific Sdn Bhd v Tenaga Nasional Bhd* [2012] 4 MLJ 296; [2012] 4 MLRA 257; [2012] 4 CLJ 478, FC (refd)

**Legislation referred to**

Competition Act 2010 ss 4, 4(1), (2)(a), (3), 15(1), 18(1)(a), (1)(b), 35, 39, 40, 40(4), 44, 51, 53, 58A

Insurance Act 1996 (repealed by Financial Services Act 2013) s 22, 22(3)

Rules of Court 2012 O 53 rr 2(3), 2(4), 3, O 92 r 4

Rules of the Federal Court 1995 r 137

*V Sithambaram (with Kwan Will Sen, Reuban Kumar Asokan, Muayyad b Khairulmaini, Wong Chee Chien and Saradha Laksmi Hariharan (Pupil in Chambers)) (Lim Chee Wee Partnership) for the applicant.*

*Khoo Guan Huat (with Shanthi Kandiah, Yo Yi Yun and Azyan Mohamed Ibrahim) (SK Chambers) for the second putative respondent.*

*Nahendran Navaratnam (with Wong Wye Wah, Lau Mark Chi-Ming and Kathleen Ramanathan) (Sreenevasan Young) for the third putative respondent.*

*Ng Yee Lin (with Dawn Wong Keng Jade) (Steven Thiru & Sudhar Partnership) for the fourth putative respondent.*

*K Shanti Mogan (with Lilien Wong and Ooi Ji Shan) (Shearn Delamore & Co) for the fifth putative respondent.*

*YM Tunku Farik bin Tunku Ismail (with Yap Mei Foong and Tan Sixin) (Azim, Tunku Farik & Wong) for the sixth, seventh, eighth and ninth putative respondents.*

*Anand Raj (with Jeevitha T Thurai Rathnam, Choo Kelly and Cynthia Lian) (Shearn Delamore & Co) for the tenth, 13th, 14th, 15th, 16th and 19th putative respondents.*

*Nereen Kaur Veriah (with Yon See Ting, Nalina Santhiran and Samuel Ong) (Christopher & Lee Ong) for the 11th and 12th putative respondents.*

*Khoo Guan Huat (with Tan Shi Wen, Melissa Long and Manshan Singh) (Skrine) for the 17th, 18th and 20th putative respondents.*

*Mark Yu Kee La Brooy (with Steven Ramesh) (Raja Darryl & Loh) for the 21st, 22nd, 23rd and 24th putative respondents.*

**Ahmad Kamal J:**

INTRODUCTION

**[1]** On 1 December 2022, the applicant (MyCC) filed a notice of application for leave to commence judicial review proceedings (encl 1) under O 53 r 3 of the Rules of Court 2012 ('the ROC') seeking the following reliefs:

(a) a declaration that the decision of the Competition Appeal Tribunal (first respondent) (CAT) in setting aside the MyCC's decision dated 14 September 2020 ('MyCC's final decision') and allowing the second to 24th respondents' appeal against MyCC's final decision is null and void and of no effect based on the grounds set out in the statutory statement filed herein;

(b) a direction of the nature of a writ of certiorari to quash the decision of the CAT dated 2 September 2022 (impugned decision), setting aside MyCC's final decision;

(c) a direction of the nature of a writ of certiorari to quash the CAT's finding in the impugned decision where the CAT determined that the 25th respondent, Bank Negara Malaysia, had the locus standi to file an appeal against MyCC's final decision pursuant to s 51 of the Competition Act 2010 ('the Act');

(d) that the MyCC be permitted to file further affidavit(s) as the MyCC considers necessary for the purposes of the judicial review proceedings herein;

(e) costs of and/or incidental to this application be costs in the cause; and

(f) such further or other relief as may be moulded by this honourable court under O 53 r 2(3) and/or under O 92 r 4 of the ROC as the facts and circumstances of the case demand.

**[2]** In essence, this matter arises from the MyCC final decision where it found that the second to 24th respondents had infringed s 4(1) read with s 4(2)(a) and (3) of the Act.

**[3]** The MyCC had given the final decision on 14 September 2020 and had ordered the second to 24th respondents the following orders:

(a) to cease and desist from implementing the agreed parts trade discount for six vehicle makes, namely, Proton, Perodua, Toyota, Honda and Naza and the hourly labour rate for PIAM Approved Repairer Scheme (PARS) workshops with immediate effect;

(b) the future parts trade discount rate and the hourly labour rate for PARS workshops are to be determined independently by the 22 insurers; and

(c) each is to pay a financial penalty.

**[4]** Dissatisfied with the MyCC final decision, the second to 24th respondents, filed appeals against the MyCC final decision to the CAT according to s 51 of the Act.

**[5]** On 2 September 2022, the CAT allowed the appeals and set aside MyCC's final decision.

**[6]** Dissatisfied with CAT's decision, MyCC filed an ex parte leave application for judicial review on 1 December 2022 against the CAT's decision.

**[7]** After the hearing, I dismissed the MyCC's application for leave to commence judicial review proceedings (encl 1). This judgment states the reasons for my decision.

PARTIES

*The applicant ('MyCC')*

**[8]** The applicant, MyCC, was established on 1 April 2011 with the purpose of enforcing the Act. The MyCC safeguards the process of free and fair competition in commercial markets for the benefit of consumer welfare.

*The Competition Appeal Tribunal ('CAT')*

**[9]** The first respondent, CAT is an independent judicial body established under s 44 of the Act. The CAT has the exclusive jurisdiction to review any decision made by MyCC under ss 35, 39 and 40 of the Act.

*PIAM and its member insurers*

**[10]** The second respondent is the General Insurance Association of Malaysia ('PIAM'). PIAM is the national trade association of all licensed direct and reinsurance companies for general insurance in Malaysia. PIAM was established in 1978 under the Insurance Act 1963 (revised 1972) and is required by law to be an association of all general insurance in accordance with s 22 of the Insurance Act 1996.

**[11]** The object of the establishment of PIAM is, among other things, the promotion and representation of the interest of its members consistent with its

constitution and the laws of Malaysia. Decisions of PIAM are executed via the issuance of Members' Circulars which are binding on its members.

**[12]** The third to 24th respondents (22 insurers) in this application are all members of PIAM.

**[13]** At the outset of the hearing, PIAM and the 22 insurers/putative respondents have been invited by this court to appear before the court at the leave stage to make representation as to whether or not leave should be granted.

**[14]** The law in relation to the locus of putative respondents is very clear and settled. In *Advance Synergy Capital Sdn Bhd (formerly known as Advance Synergy Capital Bhd) v The Minister of Finance, Malaysia & Anor* [2011] 6 MLJ 376; [2011] 7 CLJ 557; [2011] 1 MLRA 477, the Court of Appeal propounded that by virtue of O 53 r 3(3) of the ROC, the Attorney General has the locus standi to appear at leave stage of an application for judicial review. However, the putative respondent is not entitled as a matter of right to appear and demand to be heard. To appear before the court at the leave stage, the putative respondent has to be invited by the judge to make representations as to whether or not leave should be granted. Low Hop Beng JCA (as he then was) in delivering the judgment of the Court of Appeal held as follows:

> [21] On the other hand, the judge may, at the ex parte leave stage, invite the putative respondent to attend and make representations as to whether or not leave should be granted. Such invitation is normally extended where, on considering the papers, the judge comes to the conclusion that he really does not know whether there is or is not an arguable case: *R v Secretary of State for the Home Department, ex parte Rukshanda Begum* [1990] Crown Office Digest 109, DIP, CA (UK) per Lord Donaldson MR, as applied by the (then) Supreme Court in *Tuan Haji Sarip Hamid & Anor v Patco Malaysia Berhad* [1995] 2 MLJ 442; [1995] 3 CLJ 627, at p 633 per Edgar Joseph JR FCJ (as he then was). However, the putative respondent is not entitled as a matter of right to appear and demand to be heard ... (Emphasis added.)

**[15]** In *MyTeksi Sdn Bhd & Ors v Competition Commission* [2022] 6 MLJ 767; [2023] 3 MLRA 697; [2022] 8 AMR 341, the Court of Appeal concurred with the decision of *Advance Synergy Capital Sdn Bhd*. In *MyTeksi*, the Court of Appeal in discussing whether a putative respondent can file an affidavit in opposition during the leave stage held as follows:

> [22] At the commencement of the hearing before us, learned counsel for the appellants raised the issue of whether the learned High Court judge is empowered to turn the leave application into an inter partes hearing. It was pointed out that O 53 r 3(2) of the Rules of Court 2012('the ROC 2012') expressly states that applications for leave must be made ex parte.

A [23] The evidence shows that after counsel for the appellant completed his oral arguments, the learned High Court judge invited counsel for the respondents to address the court.

...

B [25] In *Advance Synergy Capital Sdn Bhd (formerly known as Advance Synergy Capital Bhd) v The Minister of Finance, Malaysia & Anor* [2011] 6 MLJ 376; [2011] 7 CLJ 557, a case cited by the appellants themselves, the Court of Appeal indeed acknowledged at para 21 that *'the putative respondent is not entitled as a matter of right to appear and demand to be heard', but it also recognised at the beginning of the said paragraph that*:

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> *... the judge may, at the ex parte leave stage, invite the putative respondent to attend and make representations as to whether or not leave should be granted. Such invitation is normally extended where, on considering the papers, the judge comes to the conclusion that he really does not know whether there is or is not an arguable case ...* (Emphasis added.)

D

BACKGROUND FACTS

**[16]** The background facts of this application based on the MyCC's affidavit and the statement can be summarised as follows:

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*MyCC's decision against PIAM and the 22 insurers*

Complaint and the investigation:

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(a) on 1 April 2015, MyCC received a complaint from one Dato' Too Peng Huat, on behalf of the Federation Automobile Workshops Owners' Association (FAWOAM) pertaining to the alleged anti-competitive conduct between PIAM and the 22 insurers;

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(b) on 20 June 2016, MyCC commenced investigations under s 15(1) of the Act into the motor insurance industry to ascertain whether there had been an infringement of the s 4 prohibition;

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(c) the investigation saw, among other things:

(i) 112 notices requesting information, documents, and statements being issued by MyCC pursuant to s 18(1)(a) and (b) of the Act;

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(ii) interviews with representatives of PIAM and the 22 insurers being undertaken pursuant to s 18(1)(a) and (b) of the Act; and

(iii) interviews with representatives from BNM, FAWOAM and the relevant adjusters.

(d) MyCC's investigations revealed that PIAM and the 22 insurers have fixed the parts trade discount and labour rates for the PARS workshop as follows:

(i) parts trade discounts of 25% for six models of vehicles namely Proton, Perodua, Nissan, Toyota, Honda and Naza;

(ii) 15% parts trade discounts for Proton BLM; and

(iii) RM30 per hour for the repair labour rates.

The proposed decision:

(e) MyCC gave its proposed decision on 22 February 2017 regarding the alleged infringement of s 4(2)(a) of the Act by PIAM and the 22 insurers.

(f) in paras 662–736 of the proposed decision, the MyCC made, inter alia, the following findings:

(i) that the decision by PIAM and its members in fixing the parts trade discount and labour rate for PARS;

(ii) workshop is an agreement which has the object of significantly preventing, restricting or distorting competition in any market for goods or services;

(iii) that the agreement is an infringement of s 4(2) of the Act; and

(iv) MyCC proposed to impose, inter alia, a financial penalty which shall not exceed the statutory maximum under s 40(4) of the Act.

(g) MyCC further established that by way of Members' Circular 132 of 2011 (Circular 132), PIAM and the 22 insurers had entered into an agreement that has the object of fixing the parts trade discount as well as the labour rate for the PARS workshop;

(h) MyCC found that the 22 insurers agreed with PIAM's recommendations on the agreed rates in the surveys issued by PIAM vide Members' Circulars No 37 and 109 of 2011 (Circulars 37 and 109);

(i) as such, MyCC found that these insurance companies have invoked their bargaining power to selectively impose and apply the agreed rates upon their own discretion which eventually left the repairers with no other recourse but to accept them, thus infringing s 4(2) of the Act.

Written and oral representations:

(j) subsequent to the proposed decision, PIAM and the 22 insurers were subsequently provided access to MyCC's files from 20 March 2017 to 24 March 2017 and on 17 April 2017;

(k) between 5 April 2017 and 26 April 2017, PIAM and the 22 insurers submitted their respective written representations to MyCC;

(l) at the request of PIAM and the 22 insurers, oral representations were made to the MyCC on the following dates:

| Session | Date |
|---|---|
| First | iii. 16 October 2017; and<br>iv. 17 October 2017 |
| Second | iii. 12 December 2017; and<br>iv. 14 December 2017 |
| Third | iii. 29 January 2018; and<br>iv. 31 January 2018 |
| Fourth | ii. 27 February 2018 |

(m) due to a change in MyCC's Chairman on 5 September 2018, the insurers requested for a de novo proceedings by way of oral representations before MyCC;

(n) on 14 November 2018, MyCC granted this request. Between 19 February 2019 to 18 June 2019, PIAM and the 22 insurers presented their oral representations to the MyCC; and

(o) the MyCC had also permitted RBB Economics (RBB), Competition Consulting Asia and BNM to make representations to MyCC with regard to the proposed decision.

Final decision and directions:

(p) on 14 September 2020, MyCC issued the final decision, where it found that PIAM and the 22 insurers had infringed the prohibition under s 4(1) read with s 4(2)(a) and (3) of the Act by participating in an agreement which has, as its object, the prevention, restriction, or distortion of competition in relation to the market for parts trade and labour rates for

PIAM approved PARS workshops from 1 January 2012 to 17 February 2017 (infringing agreement);

(q) in the final decision, MyCC imposed the following directions against PIAM and the 22 insurers:

(i) to cease and desist from implementing the agreed parts trade discount for six vehicle makes, namely Proton, Perodua, Nissan, Toyota, Honda and Naza and the hourly labour rate for PARS workshops with immediate effect;

(ii) the future parts trade discount rate and the hourly labour rate for PARS workshops are to be determined independently by the 22 insurers (collectively (i) and (ii) are referred to as the 'cease and desist order');

(iii) to pay a financial penalty ('the financial penalty');

(iv) taking into account the 25% reduction granted by the MyCC in the light of the Covid-19 pandemic. The total financial penalty to be paid amounted to approximately RM173,655,300 where each Insurer was to the following amounts:

| No | PARTY | FINANCIAL PENALTY BEFORE COVID-19 CONSIDERATION | FINANCIAL PENALTY AFTER COVID-19 CONSIDERATION |
|---|---|---|---|
| 1 | AIA | RM1,837,453.12 | RM 1,378,089.84 |
| 2 | AIG | RM5,576,149.86 | RM 4,182,112.40 |
| 3 | Allianz | RM24,732,794.62 | RM 18,549,595.97 |
| 4 | AmGeneral | RM18,284,759 | RM 13,713,569.25 |
| 5 | AXA Affin | RM16,099,289 | RM 12,074,466.75 |
| 6 | Berjaya Sompo | RM10,784,489.38 | RM 8,088,367.03 |
| 7 | Chubb | RM 5,624,894.37 | RM 4,218,670.78 |
| 8 | Etiqa | RM 5,080,436.39 | RM 3,810,327.29 |
| 9 | Liberty | RM10.821.331.07 | RM8.115,998.31 |
| 10 | Lonpac | RM 7,886,372.76 | RM 5,914,779.57 |
| 11 | MSIG | RM21,439,350.19 | RM16,079,512.64 |
| 12 | MPI Generali | RM 641,854.43 | RM 481,390.83 |
| 13 | Great Eastern | RM 2,508,333.75 | RM 1,881,250.31 |
| 14 | Pacific & Orient | RM2,108,452.33 | RM1,581,339.25 |
| 15 | Progressive Insurance | RM1,301,105.52 | RM 975,829.14 |
| 16 | Prudential Assurance | RM137.918.45 | RM103,438.84 |

| No | PARTY | FINANCIAL PENALTY BEFORE COVID-19 CONSIDERATION | FINANCIAL PENALTY AFTER COVID-19 CONSIDERATION |
|---|---|---|---|
| 17 | QBE | RM484.645.86 | RM363,484.40 |
| 18 | RHB Insurance | RM5.5733.361.53 | RM4.180.021.15 |
| 19 | Pacific Insurance | RM2,191,444.51 | RM1,643,583.38 |
| 20 | Tokio Marine | RM19,558,690.78 | RM14,669,018.09 |
| 21 | Tune Insurance | RM3,428,103.36 | RM2,571,077.52 |
| 22 | Zurich | RM7,554,069.33 | RM5,665,552 |

Appeals against the final decision and the impugned decision:

(r) dissatisfied with the final decision, PIAM and the 22 insurers filed appeals against the final decision to the CAT pursuant to s 51 of the Act ('insurer appeals'). In addition, PIAM and the 22 insurer also filed applications to stay the final decision pending the disposal of the substantive appeal pursuant to s 53 of the Act;

(s) the presiding members of the CAT tasked with hearing these appeals were:

(i) Yang Arif Dato' Dr Choo Kah Sing;

(ii) YBhg Dato' Asmabi bt Mohamad; and

(iii) YBhg Datuk Seri Dr Victor Wee Eng Lye,
('CAT Panel').

(t) on 23 March 2021, the CAT Panel allowed the stay applications filed by PIAM and the 22 insurers;

(u) in addition, BNM also filed an appeal against the final decision. BNM's appeal was heard by the CAT Panel on 15 October 2021 and 29 October 2021. During this hearing, MyCC raised the preliminary objection that BNM did not have the necessary locus to file its appeal to begin with;

(v) on 2 September 2022, the CAT Panel delivered its decision ('CAT's decision') on all the appeals where it, among others:

(i) allowed the insurer appeals and set aside MyCC's final decision;

(ii) held that BNM did have the locus standi to file an appeal against MyCC's final decision;

(iii) held that BNM did, pursuant to s 22(3) of the Insurance Act 1996, have the power to issue a direction to PIAM and its members to 'engage into the terms of the infringing agreement'; and

(iv) notwithstanding (i) and (ii) above, dismissed BNM's appeal and agreed with MyCC's findings that BNM did not issue any directive to PIAM and/or its members to fix parts trade discounts and labour rates.

(w) hence, the present judicial review application by the MyCC.

GROUNDS FOR APPLICATION FOR LEAVE

**[17]** Based on the statement, the MyCC seeks to challenge the decision of the CAT on the following grounds:

MyCC is adversely affected by the CAT's decision:

(a) MyCC has a real and genuine interest in the subject matter and is adversely affected by the CAT's decision;

(b) as the regulator for competition law, MyCC is tasked to safeguard the process of free and fair competition in commercial markets for the benefit of consumer welfare, efficiency of enterprises and the development of the economy as a whole;

(c) where an appeal against a decision issued by MyCC to the CAT is filed, MyCC and the affected enterprise engage themselves in an adversarial process before the CAT where MyCC continues its role to safeguard public interest and consumer benefit. While MyCC seeks to assist the CAT in making its decision, it does so by ensuring to assist the CAT in making its decision, it does so by ensuring the subsistence of its decision at the forefront of its mind;

(d) MyCC's mandate to safeguard consumer welfare and public interest does not cease upon the issuance of a decision by the CAT. This is especially so where the CAT may make a decision which is irrational and/or unreasonable (such as in this case);

(e) furthermore, it must be stated that if the CAT were to make a decision favouring MyCC, the affected enterprises would still be able to seek a remedy via judicial review against the decision of the CAT. Therefore, the same remedy should be available to MyCC. The principle of equality of arms must apply;

(f) without having an avenue to judicially review a decision issued by the CAT that MyCC believes to have been made in error. MyCC would thus be unable to perform its statutory duties to enforce prohibitions under the Act in order to promote and protect the process of competition for the benefit of consumers;

(g) as highlighted above, this is a dispute surrounding MyCC's findings on the existence of a price-fixing cartel that infringes s 4 of the Act. Given that the CAT's decision effectively sets aside the entirety of MyCC's findings in the final decision, it is unquestionable that MyCC is adversely affected by the CAT's decision;

(h) for the avoidance of doubt, MyCC is aware of the recent Court of Appeal decision in *Malaysian Airline System Bhd v Competition Commission and another appeal* [2021] MLJU 2089; [2022] 1 MLRA 570; [2022] 1 CLJ 856 which effectively limits MyCC's ability to challenge decisions issued by the CAT. MyCC had sought leave from the Federal Court to appeal against the decision in *AirAsia/MAS* but MyCC's application for leave was dismissed on 9 February 2022;

(i) notwithstanding the findings in *AirAsia/MAS*, the judicial review application herein is filed with a view of preserving MyCC's rights with regard to the CAT's decision especially in the light of MyCC's recent application in the Federal Court to review (pursuant to r 137 of the Rules of the Federal Court 1995 ) the Federal Court's dismissal of MyCC's application for leave to appeal; and

(j) given the review application pending in the Federal Court, MyCC remains adversely affected by the CAT's Decision.

The CAT's decision is unreasonable and/or irrational:

(k) the CAT's decision is unreasonable and/or irrational as the CAT failed to take into account relevant factors and/or considerations in making its decision.

CAT failed to consider, that as an association of enterprises, PIAM may be liable for an infringement of Section 4 of the Act:

(l) the CAT Panel, in reaching this finding concerned itself with the argument of whether an association itself had to be involved in a commercial activity for it to attract liability under s 4 of the Act;

(m) further, MyCC states that:

(i) the 22 insurers are all enterprises defined under the Act which carry out commercial activities;

(ii) PIAM is the association of these insurers;

(iii) PIAM itself does not need to carry out any commercial activity for it to participate in conduct that affects competition in the market and thus be liable for an anticompetitive infringement;

(iv) the facts above clearly show that PIAM itself facilitated, recommended and rubber-stamped the agreement between Insurers to fix parts trade discounts and labour rates even though PIAM does not carry out any commercial activity in the market; and

(v) the act of recommending an anti-competitive decision is enough to attract liability against an association of enterprises.

(n) these issues were raised during the substantive appeal itself but none of these arguments were duly addressed in the CAT's decision; and

(o) therefore, the CAT failed to apply its mind, acted mechanically, unreasonably, irrationally and/or illegally by not addressing these issues adequately in its decision.

CAT failed to consider that there was a horizontal agreement between the insurers:

(p) the CAT failed to consider the entire factual matrix leading up to the issuance of Circular 132. It had been extensively put to the CAT Panel that Circular 132 was the culmination of an agreement proposed by PIAM and agreed (by way of voting) by the 22 insurers in Members' Circular 109;

(q) further, Circular 109 and the responses to it are unequivocal. It spells out the intention of the Insurers to reject recommendations by FAWOAM on the parts trade discount and labour rates issue and instead support PIAM's counter proposal on the same;

(r) in addition, the support by the Insurers was then represented as a mandate given by the Insurers to PIAM in the negotiations with FAWOAM. This shows that the bargaining power and decision remained with the Insurers in approving any recommendation by either PIAM or FAWOAM;

(s) the above was later codified into Circular 133 which gave notice to the Insurers that their previously agreed upon position would take effect imminently. The actions of the Insurers have the characteristic of a horizontal agreement where enterprises on the same level in the production or distribution chain agree to act in a common way which limits their commercial conduct;

(t) the CAT's approach in simply finding that Circular 132 was a result of a survey is reductive, simplistic and does not reflect the factual circumstances; and

(u) the CAT had clearly acted irrationally, unreasonably and/or illegally by failing to take cognizance of the complete factual scenario in these circumstances.

CAT failed when it found that the fixing of discounts and labour rates do not constitute price fixing:

(v) the CAT had acted irrationally and/or unreasonably when it failed to consider that the fixing of discounts and labour rates is tantamount to a price-fixing agreement;

(w) the CAT failed to consider that the effect of Circular 132 limits the way parties can commercially operate. In effect, it fixes an artificial limit on discounts and labour rates and removes the ability for enterprises to make independent commercial decisions relating to their own conduct in the market;

(x) while the CAT may be correct in saying that PARS Workshops can still negotiate for better prices, it was not considered that this can only be

done within the range allowed for by Circular 132. This goes against the principle of free and fair competition;

(y) additionally, the CAT also failed to consider the usage of the Merimen System for claims processing and the fact that the quantum of discounts on parts trade and labour rates can be fixed in the Merimen System at the request of the insurance companies; and

(z) therefore, for example, a workshop can never (in the interest of competition) charge labour rates lower than RM30, more so when the parts trade discount and labour rates are being fixed in the Merimen System at the request of the insurance companies. This limits an enterprise's commercial ability and reduces uncertainty in the market, making a price fixing agreement.

CAT contradicted itself in finding that BNM has the locus standi to file an appeal against the final decision:

(aa) with respect to the appeal filed with BNM, at all material times, MyCC objected to BNM's standing as a proper appellant against the final decision;

(bb) BNM had no locus standi to file an appeal against the final decision as it was not aggrieved nor was its interest affected by the final decision; and

(cc) therefore, it is apparent that the CAT had acted irrationally, unreasonably and/or mechanically when it found that BNM had the locus standi to file its appeal. The CAT failed to consider the totality of the arguments put before it and failure to do so makes apparent a clear contradiction in the CAT's decision.

CAT acted ultra vires in finding that BNM had the power to issue directions to PIAM and the 22 insurers to enter into the infringing agreement:

(dd) another issue raised in the BNM appeal is whether BNM had the power to issue directives to PIAM and the 22 insurers pursuant to s 22 of the Insurance Act 1996;

(ee) in relation to this, MyCC took the position that the marginal note of the section clearly limits any direction given by BNM to those concerning 'Membership of Association' and not directions to enter price-fixing agreements;

(ff) in contrast, the CAT found that s 2(3) of the Insurance Act 1996 does not confine BNM to directions in relation to membership of the association. This is despite a clear limitation on the scope of the provision that has been prescribed in the statute itself; and

(gg) therefore, the CAT had acted ultra vires and acted irrationally, unreasonably and/or illegally by making this finding which is contrary to clear principles on the interpretation of the statute.

LAW FOR LEAVE TO COMMENCE JUDICIAL REVIEW PROCEEDINGS

**[18]** The governing provision for leave application to commence judicial review proceedings is provided under O 53 r 3 of the ROC.

**[19]** The well-settled test in leave application is found in *WRP Asia Pacific Sdn Bhd v Tenaga Nasional Bhd* [2012] 4 MLJ 296; [2012] 4 MLRA 257; [2012] 4 CLJ 478 where the Federal Court held that the aggrieved party has to satisfy the court that leave application is not thought of as frivolous. And, if leave is granted, an arguable case in favor of granting the relief sought at the substantive hearing may be the resultant outcome. A rider must be attached to the application though ie, unless the matter for judicial review is amenable to judicial review, no success may be envisaged.

**[20]** The principles governing applications for leave to commence judicial review proceedings have also been set out in *Tang Kwor Ham & Ors v Pengurus Danaharta Nasional Bhd & Ors* [2006] 5 MLJ 159; [2006] 1 MLRH 507; [2006] 3 CLJ 448 where Gopal Sri Ram JCA (as he then was) held:

> [10] ... the High Court should not go into the merits of the case at leave stage. Its role is only to see if the application for leave is frivolous ... So too will the court be entitled to refuse leave if it a case where the subject matter of the review is one which by settled law (either written law or the common law) is non-justiciable.

**[21]** In *Association of Bank Officers, Peninsular Malaysia v Malayan Commercial Banks Association* [1990] 3 MLJ 228; [1990] 1 MLRA 324; [1990] 1 CLJ Rep 33; [1990] 1 MELR 128; [1990] 2 ILR 308, the then Supreme Court held that the guiding principle in granting an order of certiorari is that the applicants must show prima facie that the application is

not frivolous or vexatious and that there is some substance in the grounds supporting the application. The then Supreme Court stated the following:

> At the outset of the hearing of the appeal before us we indicated to the parties that we would hear submissions on the issue of leave only. After giving due consideration to the evidence in this case and the submissions advanced by the parties we were of the view that leave to apply for an order of certiorari ought to have been given. In his grounds of judgment the learned judicial commissioner had gone further than the leave stage and embarked on substantial issues on merit. We did not think that this was the right approach when the application for leave to apply for an order of certiorari is made. *The guiding principles ought to be that the applicants must show prima facie that the application is not frivolous or vexatious and that there is some substance in the grounds supporting the application*. On the evidence in this case we found that the appellants had prima facie an arguable case for the granting of the relief they were seeking. Their application was not frivolous or vexatious. There were grounds to consider the allegations made by the appellants and which could only be properly heard and determined on the substantive application for an order of certiorari after leave has been granted. (Emphasis added.)

**[22]** In the case of *Bandar Utama Development Sdn Bhd & Anor v Lembaga Lebuhraya Malaysia & Anor* [1998] 1 MLJ 224 at 225; [1997] 3 MLRH 293; [1997] 4 CLJ 725; Visu Sinnadurai J (as he then was) held that:

> ... The court, in exercising its discretion that an application for leave be granted, must be convinced by the applicants that prima facie the application is genuine and there is some substance in the grounds supporting the application. The test's threshold is very low; a prima facie case of reasonable suspicion, an arguable case must be shown, not a prima facie case. *Additionally, an application will fail if it is frivolous, vexatious, misconceived, made by busybodies with misguided or trivial complaints of administrative errors, groundless, where there are more appropriate alternative remedies, and where the application for judicial review is inappropriate.* (Emphasis added.)

**[23]** In *Dr Amir Hussein bin Baharuddin v Universiti Sains Malaysia* [1989] 3 MLJ 298; [1989] 4 MLRH 408 Edgar Joseph J (as he then was) held that:

> ... the test in an application for leave is whether the applicant has an arguable case for review, a sufficient interest and whether there has been any undue delay.

**[24]** Based on the above cases, the MyCC in the instant application has to satisfy the test or requirement propounded in order to secure leave to commence the judicial review proceedings. At this stage, this court need not go into the merits of the case, but only to see if the subject matter is amenable to judicial review or not; whether the application for leave is frivolous and whether an arguable case of granting the reliefs sought at the substantive hearing may be the resultant outcome.

PRELIMINARY OBJECTION

**[25]** The application for leave to commence judicial review (encl 1) was jointly objected to by PIAM and the 22 insurers/putative respondents on a similar ground that the MyCC does not have the locus standi to challenge the decision issued by CAT.

THE DECISION OF THE COURT

**[26]** In gist, PIAM and the 22 insurers/putative respondents submit that:

(a) MyCC lacks locus standi to commence the present judicial review because MyCC is not a party 'adversely affected' by CAT's decision. This is in light of the Court of Appeal's decision in *AirAsia/MAS*;

(b) MyCC's review application at the Federal Court is of no relevance because this honourable court should apply the law as it presently stands;

(c) to allow MyCC to challenge the CAT's decision would be contrary to the need to have finality in litigation;

(d) MyCC cannot apply to judicially review the decision of its own appellate body. To do so 'would be administrative insubordination'; and

(e) even if MyCC is granted leave to commence judicial review proceedings, the judicial review proceedings are bound to fail as MyCC has no arguable case.

**[27]** In response, MyCC's replies are briefly as follows:

(a) MyCC is adversely affected by the CAT's decision and the *AirAsia/MAS*, which involves different facts and issues, is distinguishabl;.

(b) MyCC's review application at the Federal Court is a separate proceeding which is different from the present judicial review application;

(c) MyCC's judicial review application does not offend the need to have finality in litigation;

(d) the CAT is not MyCC's 'own appellate authority' and MyCC is entitled to seek judicial review against the decision of the CAT which is an independent body; and

(e) it is premature to determine that MyCC's judicial review application is bound to fail when the merits of MyCC's judicial review application is not considered yet at this stage.

**[28]** The locus standi of a person filing for judicial review has been provided under O 53 r 2(4) of the ROC as follows:

Any person who is *adversely affected by the decision*, action or omission in relation to the exercise of the public duty or function shall be entitled to make the application. (Emphasis added.)

**[29]** For the MyCC to establish locus standi in this matter, they must show to this court that they are adversely affected by the impugned decision made by the CAT.

**[30]** This honorable court is enlightened by the Federal Court case of *Malaysian Trade Union Congress & Ors v Menteri Tenaga, Air dan Komunikasi & Anor* [2014] 3 MLJ 145; [2014] 2 CLJ 525; [2014] 2 MLRA 1; [2014] 2 AMR 101 where it has clearly explained the adversely affected test:

[41] In the Court of Appeal, the majority decision of the Court of Appeal applied the test as propounded in Lim Kit Siang's case to determine whether the appellants had locus standi to bring this action. In her judgment Zaleha Zahari JCA (as she then was) said:

...

In respect of the second to 14th applicants I am of the view that these applicants had no locus standi under O 53 of the Rules to file an application for judicial review. These applicants dissatisfaction with the decision of the Minister in rejecting MTUC's application does not make them persons who were 'adversely affected' by the Minister's decision falling within the ambit of O 53. They were clearly strangers to the said application. The question of the second to 14th applicants being wrongly deprived of a fundamental or legal right does not accordingly arise. On this ground alone, I am of the view that the application of the second to 14th applicants should have been dismissed.

...

[57] In view of the foregoing *we are of the view* that the view expressed by the Court of Appeal in QSR Brands Bhd v Suruhanjaya Sekuriti & Anor *that the 'adversely affected' test was a single test for all the remedies provided for under O 53 of the RHC is to be preferred.*

Hence the answer to the question posed in this appeal has to be in the negative.

[58] However, we are not prepared to accept the appellants' argument that the 'sufficient interest' test under O 53 r 3(5) of the English Supreme Court Rules 1977 is no different from the 'adversely affected' test under O 53 r 2(4) of the RHC as the two tests do not have the same meaning. Therefore, in determining the locus standi to sue, the court has to exercise caution in applying the English cases. *In our view for an applicant to pass the 'adversely affected' test, the applicant has to at least show he has a real and genuine interest in the subject matter.* It is not necessary for the applicant to establish infringement of a private right or the suffering of special damage.

...

[60] We now turn to the issue of whether MTUC is a person adversely affected by

A the Minister's decision to reject the application for the disclosure of and access to the two documents. *At this stage, which concerns with the substantive locus standi, the court is more concerned with the exercise of its remedial discretion. The court has to assess the applicant's claim to standing against the whole legal and factual context of the application.* Other factors which the court has to consider at this stage as suggested by case *law are the merit of the challenge, the importance of vindicating the rule of law, the importance of the issue raised, the likely absence of any other challenger* ...

...

[62] ... *We would also like to mention here that from the affidavit evidence it had not been shown that the water tariffs imposed or to be imposed were excessive and there was unreasonable profiteering by SYABAS*. What had been proved was that the water tariff was reviewed and increased by 15% in November 2006. MTUC claimed that there was no transparency in the review as the basis of the review was questionable. (Emphasis added.)

**[31]** Having perused the evidence produced before this court, I am of the view that the MyCC lacks the locus standi required to commence judicial review proceedings to challenge the CAT's decision as they are not a person adversely affected by the decision of the CAT.

**[32]** The question as to whether the MyCC, as a quasi-judicial body is a person 'adversely affected' by a decision of the CAT, its own appellate tribunal, has been answered in the Court of Appeal case of *AirAsia/MAS*.

**[33]** *AirAsia/MAS* has expressly ruled that the MyCC as a quasi-judicial body cannot challenge and/or review the decision of its own appellate body, the CAT and is not 'adversely affected' within the meaning of O 53 r 2(4) of the ROC.

**[34]** The Court of Appeal in the *AirAsia/MAS* provides that once the MyCC has made a finding under s 40 of the Act, the MyCC becomes functus officio and would no longer have any interest in the matter.

**[35]** As the MyCC is not a person 'adversely affected' by the decision within the meaning of O 53 r 2(4) of the ROC, the MyCC does not have locus standi to file this judicial review leave application.

**[36]** The Court of Appeal in *AirAsia/MAS* held as follows:

Whether the MyCC Has the Locus Standi to Apply for A Judicial Review of the CAT's decision?

[41] The MyCC is a body corporate established pursuant to s 3 of the Competition Commission Act 2010 (Act 713). The power and functions of the MyCC are contained in ss 16 and 17 of the Competition Commission Act. The MyCC also has

the power of investigation and enforcement under Part III of the Competition Act.

[42] *Clearly, the MyCC is a quasi-judicial body judging from its powers and functions under Part III* relating to investigation and enforcement and Part IV relating to decision making, especially the conduct of hearing for the purpose of determining whether any enterprise has infringed any prohibition under the Competition Act 2010.

[43] *In our considered view, after the MyCC makes a finding under s 40 of the Act, it has no personal interest in the proceeding* save to assist the CAT in an appeal before it by an aggrieved party. *It becomes functus officio as far as the proceeding is concerned.* We agree with learned counsel for AirAsia in her submission that *a quasi-judicial body cannot review the decision of its own appellate tribunal.*

[44] Under the statutory scheme of the Act, the CAT is the appellate authority of the MyCC. Therefore, *the MyCC must give due deference to and respect for its superior's appellate decision and abide by the decision of the CAT. For the MyCC to ignore or challenge the decision of its own appellate authority would be administrative insubordination of a kind repugnant to the whole statutory scheme of the Act. Parliament may by express provision provide a further avenue for the MyCC to challenge the decision of its own appellate authority but it has not seen it fit to do so in this case* …

[45] The MyCC, in exercising its quasi-judicial functions of weighing the evidence before it and coming to a decision that is enforceable under the law, takes a neutral and impartial stand before its appellate authority in the CAT and its task is to assist the CAT to arrive at a fair and just decision. It takes no partisan stand and has no personal or official interest in the confirmation or reversal of its order handed down in its quasi-judicial capacity.

[46] As such, the *MyCC cannot be 'a person who is adversely affected by the decision' within the meaning of O 53 r 2(4) of Rules of Court 2012 ('the ROC') and thus cannot apply for a judicial review of its own Appellate Tribunal under the Act.* (Emphasis added.)

**[37]** I am of the view that in light of the judicial precedent being the heart of the administration of justice in our country, this court is bound by the decision of the Court of Appeal in *AirAsia/MAS* in deciding the present case.

**[38]** I find support for my view by referring to the Federal Court case of *Kerajaan Malaysia & Ors v Tay Chai Huat* [2012] 3 MLJ 149; [2012] 3 CLJ 577; [2012] 1 MLRA 661 [2012] 1 MELR 501 where it was held as follows:

[53] The common law tradition is built on the *doctrine of stare decisis which directs a court to look to past decisions for guidance on how to decide a case before it.* This means that the *legal rules applied to a prior case with facts similar to those of the case now before a court should be applied to resolve the legal dispute.* The use of precedent has been justified as providing predictability, stability, fairness and efficiency in the law. *Reliance upon precedent contributes predictability to the law because it provides notice of what a person's rights and obligations are in particular circumstances.* It also means that lawyers can give legal advice to clients based on settled rules of law. *There is certainty*

*in the law. There is also uniformity in the law. Similar cases will be treated in the same way. The use of precedent also stabilises the law.*(Emphasis added.)

**[39]** Therefore, the MyCC judicial review leave application is a non-starter and the MyCC has failed to meet the threshold for judicial review leave to be granted.

THE MYCC WAS AWARE THAT THE COURT OF APPEAL'S DECISION IN AIRASIA/MAS IS SETTLED LAW

**[40]** It is my considered view that as this issue has been addressed by the Court of Appeal in the *AirAsia/MAS*, it has become settled law, which the MyCC is aware of because the MyCC was a party to the appeal in which the AirAsia/MAS was made.

**[41]** After the Court of Appeal delivered the AirAsia/MAS decision, the MyCC attempted to appeal the decision to the Federal Court. However, the MyCC's leave application at the Federal Court was dismissed on 9 February 2022.

**[42]** Thereafter, on 12 October 2022, the MyCC filed an application under r 137 of the Rules of the Federal Court 1995 to review the Federal Court's earlier decision in dismissing the MyCC's leave application (Federal Court review application).

**[43]** The MyCC's action in filing the Federal Court review application which essentially seeks for the Federal Court to revisit the issue of whether the MyCC is empowered to review the decision of the CAT, its own appellate tribunal, is a tacit admission on part of the MyCC that, as of the date of filing of this judicial review leave application on 1 December 2022, the status quo legal position in this country is that the MyCC does not have locus standi to commence this action and that the MyCC is not 'adversely affected' within the meaning of O 53 r 2(4) of the ROC.

**[44]** Further, I am of the opinion that the MyCC had always been aware that it did not have sufficient locus standi and was not 'adversely affected' within the meaning of O 53 r 2(4) of the ROC for the following reasons:

(a) on 25 April 2022, the MyCC issued a Consultation Paper on the Proposed Amendments to the Act (Consultation Paper) and the salient points of the Proposed Amendments to the Act (salient points) where the MyCC had proposed the insertion of s 58A to the Act to provide the MyCC with a right to appeal to the High Court against decisions made by the CAT;

(b) specifically, the salient points had stated that 'Section 58A was introduced following the decision of the Court of Appeal in the *Malaysian Airline System Bhd v Competition Commission and another appeal* [2021] MLJU 2089; [2022] 1 MLRA 570; [2022] 1 CLJ 856 to allow an appeal to 'be made at the instance of a person who was a party to the proceedings in which the decision of the Competition Appeal Tribunal was made';

(c) premised on the above, it is clear that the MyCC was fully aware that the prevailing law in this country does not permit the MyCC with any right of review or appeal against a decision of the CAT; and

(d) therefore, the MyCC's action of filing this judicial review leave application is ultra vires, unlawful and untenable based on the clear legal position laid down by the Court of Appeal in the *AirAsia/MAS* and the MyCC's subsequent action in proposing that Parliament legislates a right of appeal specifically because of the consequences arising from the *AirAsia/MAS* decision.

**[45]** Interestingly, the MyCC in fact is aware of this and has admitted to its lack of locus standi in paras 78–80 of the MyCC's affidavit.

FULL AND FRANK DISCLOSURE

**[46]** Having perused the cause papers, I find that the MyCC had failed to adhere to its duty of full and frank disclosure in this judicial review leave application. This is because, the MyCC has omitted to bring to the attention of this court the Consultation Paper and the salient points which show that the MyCC is seeking to amend the Act to confer itself a right of review or appeal against a decision of the CAT in light of the *AirAsia/MAS* decision — as no such right currently exists.

**[47]** The MyCC submits that the proposed amendments to the Act bear no significance to the leave application herein for the following reasons:

(a) the proposed amendments are merely proposals to amend the Act which have not been passed by Parliament. Therefore, it remains to be seen whether these amendments will be implemented and enforced (including the proposed addition of s 58A allowing MyCC to launch judicial review applications against decisions made by the CAT); and

(b) it is therefore speculative for this honourable court to consider a fact that is not in existence yet. Parliament may still dismiss the proposed amendments and therefore, as things stand, it bears no significance to this leave application.

**[48]** According to the MyCC, what is material has already been disclosed by MyCC. These are facts that may affect the leave application, particularly with respect to the issue of MyCC's locus standi. This includes the Court of Appeal's decision in *AirAsia/MAS* the Federal Court's dismissal of MyCC's leave application to challenge *AirAsia/MAS* and MyCC's subsequent application to review the Federal Court's dismissal of leave.

**[49]** It is clear from the above, that for this court to grant leave, the MyCC must produce all relevant and material facts/documents/cause papers before the court can fully determine if the MyCC had prima facie an arguable case for the relief being sought and that the said application was neither frivolous nor vexatious.

**[50]** I find support for my view based on the Federal Court decision in *Tuan Hj Sarip Hamid & Anor v Patco Malaysia Bhd* [1995] 2 MLJ 442; [1995] 1 MLRA 536; [1995] 3 CLJ 627 when it was held as follows:

> [1] Any application under O 53 r 1(2) must be drafted in such a way as to ensure that it contains all or substantial particulars of the facts and matters on which the applicant intends to rely in support of his application. *The affidavit in support* thereof must also be sufficiently *detailed and comprehensive and must exhibit all the relevant documentary exhibits. The contents of the affidavit here left much to be desired so much so that there was insufficient material for the Judge below to have granted leave.*
>
> [2] As t*he application for leave to apply for certiorari is made ex parte, there is a clear duty of disclosure imposed by law on the applicant, the breach of which may result in the order for leave being set aside.* On the facts however, the respondent was not guilty of any nondisclosure. (Emphasis added.)

**[51]** Further, in the case of *Mior Rosli bin Mior Mohd Jaafar v Mahkamah Perusahaan Malaysia* [2010] MLJU 1674; [2010] 12 MLRH 352; [2010] 1 LNS 1539, Mohd Zawawi Salleh J (as he then was) held as follows:

> [15] It is not disputed that *the applicant, in his supporting affidavit, failed to exhibit the following cause papers or documents which had been before the Industrial Cour*t:
>
> 51.1 applicant's statement of case;
>
> 51.2 second respondent's statement in reply;
>
> 51.3 applicant's bundle of documents;
>
> 51.4 second respondent's bundle of documents;
>
> 51.5 loose documents respectively marked as 'CO-1', CO-2', 'CO-3' and 'CO-4';
>
> 51.6 applicant's witness statement; and
>
> 51.7 second respondent's witness statement.

A

> [16] *As a result of the applicant's foregoing failure, the applicant, in obtaining leave on 24 April 2009 to apply for judicial review, had suppressed and/or failed to declare and produce all material facts and documents, and had further engaged in a selective presentation of documents.*
>
> [17] The applicant in fact acknowledges his failure at para 30 of the said supporting affidavit.
>
> [18] *At the material time the court granted leave to the applicant, it did not have all relevant and material facts/documents/cause papers before it in order to fully determine if the applicant had prima facie an arguable case for the relief being sought* and that the said application was neither frivolous nor vexatious. (Emphasis added.)

B

C

(See also *Suruhanjaya Perkhidmatan Awam Malaysia v Noordin bin Hassan* [1995] 3 MLJ 495; [1996] 1 AMR 030; [1995] 2 MLRA 185.)

D

**[52]** Based on the above, it is trite that it is the duty of a person applying for certiorari to show the utmost good faith in the presentation of the material upon which he wishes the court to rely. Failure to do so, may result in the order for leave being refused and/or set aside.

E

**[53]** This court is of the considered view that the MyCC had failed to exhibit all the relevant documents to ensure that the court has a complete picture of the case by failing to disclose the Consultation Paper and the salient points where the MyCC had proposed for the insertion of s 58A to the Act to provide the MyCC with a right to appeal to the High Court against decisions made by the CAT.

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**[54]** The salient points stated that 'Section 58A was introduced following the decision of the Court of Appeal in the '*Malaysian Airline System Bhd v Competition Commission and another appeal* [2021] MLJU 2089; [2022] 1 MLRA 570; [2022] 1 CLJ 856' AirAsia/MAS to allow an appeal to 'be made at the instance of a person who was a party to the proceedings in which the decision of the Competition Appeal Tribunal was made'. In any event, this indicates that the MyCC was fully aware that the law in Malaysia does not permit the MyCC with any right to review or appeal against decisions made by the CAT.

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**[55]** Premised on this, I am of the view that the MyCC had failed to adhere to its duty of full and frank disclosure in this judicial review leave application. This is because, the MyCC, as a regulator and custodian of competition law, had simply failed to appraise this court of the crucial Consultation Paper and the salient points which show the inner workings and actions taken by the MyCC in seeking to amend the Act to confer itself a right of review or appeal

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against a decision of the CAT in light of the AirAsia/MAS decision — as no such right currently exists.

CONCLUSION

**[56]** Premised on the above, this court is of the view that the MyCC's action of filing this judicial review leave application is ultra vires, unlawful and untenable based on the MyCC's tacit admission seen through its conduct taken to seek for the Federal Court to revisit the issue of whether the MyCC is actually empowered to review the decision of the CAT to begin with.

**[57]** It is my considered view that the MyCC has failed to cross the hurdle of the judicial review test. As discussed above, the subject matter in this case has been settled by law. It is clear that there is no arguable case for the MyCC. Therefore, this application for leave is frivolous.

**[58]** Thus, this application for leave to commence the judicial review proceeding (encl 1) is dismissed with costs of RM10,000 to PIAM and the 22 insurers/second to 24th putative respondents subject to allocator fee.

*Application dismissed.*

Reported by Nabilah Syahida Abdullah Salleh